IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

CRP.No. 295 of 2000(C)

AGAINST THE ORDER DATED 9.4.1999 IN I.A.NO.5506/1998 IN AS.NO.64/1996
of I ADDL.SUB COURT,ERNAKULAM

REVN. PETITIONER:S PETITIONERS: APPELLANTS:

1. JACOB, S/O.OUSEPH, KOCHAPILLIL HOUSE,
VATTATHIL, VENNALA P.O., KOCHI – 28.

2. MARY ALIAS SEENA, W/O.DR.K.L.BABU,
KURUPASSERY HOUSE, VENGERI P.O., CALICUT.

BY ADV. SRI.K.L.JOSEPH

RESPONDENTS: RESPONDENTS:RESPONDENTS:

1. VIRONI, W/O.LATE VARUTHUKUTTY, RESIDING AT
VATTATHIPADATH HOUSE, VENNALA KARA,
EDAPPALLY SOUTH VILLAGE, KANAYANNUR TALUK.

2. ANJALI, W/O.GEORGE, NAMBIAMPARAMBIL HOUSE,
VENNALA KARA, EDAPPALLY SOUTH VILLAGE,
KANAYANNUR TALUK (DIED).

3. MARY, W/O,.XAVIER, THATTASSERY HOUSE,
MARADU DESOM, KANAYANNUR TALUK.

4. CLARA, W/O.RAPHAEL, PANAKATTU HOUSE,
CHALICHERRY ROAD, THEVARA DESOM,
ELAMKULAM VILLAGE, KANAYANNUR TALUK.

5. TREASA EJIDIS, W/O.EJIDIS, CENTRAL GOVERNMENT EMPLOYEE,
VETTATHIPADATH, VENNALA KARA, EDAPPALLY SOUTH VILLAGE.

6. ANNIE, W/O.AUGUSTINE, MUKKATHU HOUSE,
POWER HOUSE ROAD, ERNAKULAM, COCHIN – 18.

7. JOHNSON VARGHESE SAMUEL, ALLEYIL HOUSE,
ELAMPAL P.O., AROMPUNNAKKARA, PUNALUR.

R1, R3 TO R6 BY ADV. SRI.T.B.THANKAPPAN
SRI.V.P.RAMESAN
SMT.K.DEEPA

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21/08/2007, ALONGWITH C.R.P.NO.296 OF 2000 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T. SANKARAN, J.

C.R.P. NOS. 295, 296, 297, 298 & 1141 OF 2000

Dated this the 21st day of August, 2007

O R D E R

The revision petitioners are the defendants in O.S.No.1281 of 1993, on the file of the Munsiff's Court, Ernakulam. The suit was filed by the respondents for declaration and for mandatory and prohibitory injunction. The suit was decreed on 31.10.1995. The defendants appealed as A.S.No.64 of 1996, on the file of the Sub Court, Ernakulam. That appeal was dismissed on 31.1.1998. The defendants filed S.A.No.391 of 1998 challenging the judgment and decree of the lower Appellate Court.

2. During the pendency of the appeal before the lower Appellate Court, the second respondent in the appeal (second plaintiff) died on 20.11.1996. It is stated that the counsel had filed a memo under rule 10A of Order XXII of the Code of Civil Procedure stating that the second respondent in the appeal was dead. In spite of that, her legal representatives were not impleaded. However, without noticing the death of the second respondent in the appeal, the lower Appellate Court dismissed the appeal on the merits.

3. The Second Appeal was admitted. The respondents appeared. At the time of hearing, it was pointed out by the respondents that the second respondent was dead even while the first appeal was pending before the lower Appellate Court. The appellants submitted that on that ground the Second

Appeal was liable to be allowed and the judgment and decree of the lower Appellate Court was liable to be set aside. That request was not accepted. However, this Court while disposing of the Second Appeal held as follows:

> "If the appellants feel that they must get the judgment and decree of the lower appellate court re-opened, it is for them to move the lower appellate court and it is for the lower appellate court to consider whether any sufficient grounds are made out. The appellants cannot take advantage of their own default and seek a nullification of the judgment of the lower appellate court by filing a Second Appeal and then pointing out that they had failed to implead the legal representatives of respondent No.2 in the lower appellate court. Without prejudice to the right of the appellants herein, who are the appellants before the lower appellate court to move the lower appellate court for appropriate reliefs, this Second Appeal is closed."

4. After the disposal of the Second Appeal on 26th October, 1998, the revision petitioners/defendants filed five applications before the lower Appellate Court. I.A.No.5503 of 1998 was filed to re-open the judgment and decree. The other applications, namely, I.A.Nos.5504 of 1998, 5508 of 1998, 5507 of 1998 and 5506 of 1998 were respectively to implead the legal representatives of the second respondent, to set aside the abatement, to condone the delay of 642 days in filing the application for impleadment and to condone the delay of 582 days in filing the application for setting aside the abatement.

5. The court below considered I.A.No.5503 of 1998 (to re-open the judgment and decree) and by the order dated 9.4.1999, dismissed the application. Consequently, all the other applications were also dismissed on the

same date. Five Civil Revision Petitions are filed challenging the orders passed by the lower Appellate Court.

6. The reason for dismissing I.A.No.5503 of 1998 is that while disposing of S.A.No.391 of 1998, this Court had not remanded the case to the lower Appellate Court. Reference was made to the decision in **Assyamma** v. **Aisabi** (1976 KLT 101), in which an identical situation arose. In that case, the suit was dismissed by the trial court and the dismissal was confirmed in appeal. The plaintiff filed a Second Appeal. In the Second Appeal, two applications were filed, one for impleading the legal representatives of the second respondent therein and the other for condoning the delay in filing the Second Appeal as against the legal representatives. It was contended that the applications were not maintainable and that the Second Appeal itself was not maintainable. It was held by the Court thus:

> "3. The proper course in the circumstances to be adopted, in my opinion, is to set aside the ineffective decree of the first appellate court, giving the appellant herein an opportunity to take such steps as are necessary to have the abatement set aside, if she is entitled to do so, and to have the matter proceeded with after bringing on record the legal representative of the deceased 2nd respondent. In order to enable the appellant to do this the judgment and decree of the first appellate court are set aside and the appellant is directed, if she so chooses, to take appropriate steps to have a proper decree passed by that court with all the necessary parties on record.
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> 4. Sri.P.C.Balakrishna Menon, the counsel for the appellant, submits that the two petitions may be sent down to the first appellate court for disposal. I do not however, consider that it is the correct thing to do. As the appeal itself is not competent in this Court, the petitions are also not competent; they are therefore dismissed

> without prejudice to the petitioner's right to seek the remedy available to her in the first appellate Court. The decision I have taken is in consonance with the provisions of Order XXII, Rule 9 of Code of Civil Procedure, and the views expressed in the decisions reported in K.Manna v. Santra (AIR 1970 Calcutta 99); Achher Singh v. Ananti (AIR 1971 Punjab 477); Mrs. Gladya Coutts v. Bharkhan Singh (AIR 1956 Patna 373); Muna Devi v. Ram Shari Devi (AIR 1969 Patna 314) and C.Abdulla v. E.I.Damodaran (AIR 1972 Kerala 116).
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> The petitions are dismissed; and the second appeal is disposed of by remanding the matter to the first appellate court where it would be open to the appellant to move for appropriate reliefs, if so advised, as indicated above."

7. In the case on hand, the court below relied on one sentence in the decision in Assyamma's case that "the second appeal is disposed of by remanding the matter to the first appellate court" and held that such a direction was not issued in the present case while disposing of S.A.No.391 of 1998. It was noticed that in S.A.No.391 of 1998, this Court refused to set aside the decree of the lower Appellate Court and only observed that the appellants therein would be entitled to approach the lower Appellate Court for re-opening the judgment and decree of the lower Appellate Court. I am of the view that the court below was not justified in making such a distinction as is done in the order impugned.

8. When a Second Appeal is filed against the judgment and decree, which are null and void on account of the non-impleadment of the legal representatives of the respondent, the Second Appeal itself would not be

maintainable. Therefore, the Second Appeal could not be allowed and the judgment and decree of the lower Appellate Court could not be set aside on the ground that the decree is null and void. The case would be different if the Second Appeal is filed by the respondents in the Appeal before the lower Appellate Court, voicing the grievance that the lower Appellate Court should not have allowed the appeal with a dead man on the party array. In such a case, the respondents in the appeal before the lower Appellate Court could successfully contend in the Second Appeal that the decree passed by the lower Appellate Court is a nullity and get the judgment and decree of the lower Appellate Court set aside. Such a relief would not be available to the appellants in the appeal before the lower Appellate Court, who failed to implead the legal representatives of the deceased respondent and whose Appeal was dismissed by the lower Appellate Court without noticing the death of the said respondent. A distinction is to be drawn between a decree passed in favour of the appellant who succeeded in the appeal though he failed to implead the legal representatives of the deceased respondent in the appeal, on the one hand, and a decree passed against the appellant on the merits and who also failed to implead the legal representatives of the deceased respondent, on the other. In the former, the remaining respondent in the appeal or the legal representatives of the deceased respondent in the Appeal before the lower Appellate Court has a grievance to be ventilated in the Second Appeal. That is, the lower Appellate Court should not have allowed the appeal on the failure of the appellant therein to take steps

to implead the legal representatives of the deceased respondent in that appeal. In such a situation, the legal representatives of the deceased sole respondent in the Appeal before the lower appellate court also could file a Second Appeal and challenge the decree passed in the Appeal. In the latter situation, an appellant, who failed to file application for impleading the legal representatives of the deceased respondent cannot successfully challenge the dismissal of his appeal on the merits, by filing a Second Appeal. Such a person cannot get the judgment and decree of the lower Appellate Court set aside on account of his own fault. This distinction was not borne in mind by the lower Appellate Court while dismissing I.A.No.5503 of 1998. I am the view that the application to re-open the Appeal filed by the petitioners is maintainable, particularly in view of the observations in the judgment in S.A.No.391 of 1998.

9. For the aforesaid reasons, I set aside the order passed by the court below in I.A.No.5503 of 1998 and allow that application. C.R.P.No.297 of 2000 filed by the petitioners challenging the order in I.A.No.5503 of 1998 is accordingly allowed.

10. The other applications filed before the lower Appellate Court were dismissed, consequent on the dismissal of I.A.No.5503 of 1998. Since I have set aside the order in I.A.No.5503 of 1998, all the other Civil Revision Petitions are also liable to be allowed.

11. Accordingly, the Civil Revision Petitions are allowed. The lower Appellate Court shall consider and dispose of I.A.Nos.5504 of 1998, 5506 of 1998, 5507 of 1998 and 5508 of 1998 on the merits, after affording an opportunity to the parties to adduce evidence. Learned counsel for the respondents submitted that the decree was executed on 18.2.1999 and the attempt of the revision petitioners is only to harass the respondents. It is also contended that there is no merit in the applications. Taking into account the facts and circumstances of the case, I am of the view that the disposal of the Revisions in the manner indicated above would be on condition that the petitioners shall pay a sum of Rs.1,500/- as costs to the respondents on or before 30th September, 2007. If the petitioners fail to pay the costs within time, the Civil Revision Petitions shall stand dismissed.

The parties shall appear before the lower Appellate Court on 24th September, 2007.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

C.R.P.NOS.295, 296, 297, 298 &
1141 OF 2000

JUDGMENT

21st August, 2007